In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1513

LOUIS EDWARD BURGUENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1970. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to May 5, 1970, and the petition was filed on May 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a Selective Service registrant classified I-O, who had passed an Armed Forces physical examination and was ordered to report for civilian work in lieu of induction, had an absolute right to have in addition a final Army physical inspection similar to that given to I-A and I-A-O registrants at induction centers.

2. Whether, on the instant facts, petitioner's classification as a conscientious objector, rather than as a minister, had a basis in fact.

STATEMENT

After a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted of failing to comply with an order of his local board to report for specified civilian work in lieu of induction into the Armed Forces, in violation of 50 U.S.C. App. 462. On July 1, 1969, he was sentenced to three years' imprisonment.

In September 1964, petitioner registered with his local board in Long Beach, California. In his classification questionnaire petitioner, a Jehovah's Witness, claimed to be a gardener by occupation and a part-time student preparing for the ministry of his religious sect; he also claimed to be a conscientious objector (SS File 4-8).[1] In August 1965, petitioner was

[1] "SS File" refers to petitioner's Selective Service file which was admitted into evidence at trial and which we are lodging with the Clerk of this Court. "T." refers to the trial transcript, which is already on file with the Clerk.

classified as a I-O registrant (conscientious objector) (SS File 11, 22-24). In November 1965, petitioner took a required Armed Forces physical examination, but failed the mental test portion of the examination and was classified I-Y (SS File 23, 25). In March 1967, another examination[2] resulted in petitioner's being found acceptable (SS File 30-34), and he was thereafter again given a I-O classification (SS File 43).[3]

In June 1967, petitioner was notified that as a I-O registrant he was to obtain suitable civilian employment in lieu of induction through his own efforts (SS File 42, 43).[4] Petitioner replied that he desired to continue working as an inspector at Douglas Aircraft, and that this work contributed to the national safety and paid him $100 per week (SS File 44-45). Since employment with an aircraft manufacturer was not an approved type of civilian work to be performed in lieu of induction, the board offered petitioner a choice of three positions with specified medical or charitable institutions. He declined all three (SS File 49-51). In August 1967, petitioner was ordered to

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[2] Petitioner is a high school graduate (SS File 31, 39); on re-examination in 1967, his score on the mental test placed him in the second highest group (SS File 32).

[3] Petitioner is in error when he asserts that this I-O classification was "without another physical examination" (Pet. 4). After initially refusing to report for such examination (SS File 41), he took the examination on the scheduled date (SS File 31, 40).

[4] No appeal was taken from this June 9, 1967, notice of classification (T. 19-20).

attend a meeting with a representative of the State Selective Service Director and the local board in an effort to agree on a civilian work assignment (SS File 55). On September 14, 1967, petitioner attended the scheduled meeting. He there reiterated his refusal to accept any of the jobs the board had offered. He stated that he was neither a full-time nor pioneer minister of his sect, but that he devoted "fourteen hours" to his religious work.[5] He reiterated his desire to continue his employment as an inspector at Douglas Aircraft, and "affirmed" that the pay at Douglas was a motivating factor in his decision (SS File 56-57). By a 2-0 vote the local board decided that work at the Los Angeles Department of Charities was available and appropriate for petitioner (SS File 57).

On December 14, 1967, the local board mailed an Order to Report for Civilian Work and Statement of Employer (Form 153) to petitioner, directing him to report to the Los Angeles County Department of Charities for civilian work on December 26, 1967 (SS File 64). Petitioner failed to report as ordered (SS File 68-70), and the instant prosecution followed.

ARGUMENT

1. Petitioner asserts that he was not given the basic Armed Forces physical examination before his final I-O classification, nor a final-type Army physical

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[5] It is not clear whether this was on a weekly or monthly basis. In June 1967 petitioner had stated that he studied for the ministry on Thursday evenings (SS File 45).

inspection (such as that given to I-A and I-A-O registrants at induction centers) before being ordered to report for civilian work (Pet. 4, 6). Petitioner, however, is in error as to the facts relating to the basic physical examination. After failing one portion of such an examination in 1965, he received and passed another such examination in March 1967, and only then was given his final I-O classification (SS File 30-34, 43). He was entitled to no more. We recognize that the governing statute and regulations (see particularly 50 U.S.C. App. 451 (c) and 32 C.F.R. 1622.1) require fair and equal treatment for all registrants, but that was achieved by the basic examination given petitioner before he was assigned civilian employment. Unlike I-A and I-A-O registrant, petitioner would never be subject to the rigors of military life in a combat zone. Accordingly, the absence of a final physical inspection did not result in his being treated unfairly. *E.g.*, *Shoemaker* v. *United States*, 413 F. 2d 274 (C.A. 9), certiorari denied, 396 U.S. 837; see also *United States* v. *Manns*, 232 F. 2d 709, 712 (C.A. 7); *Miller* v. *United States*, 169 F. 2d 865, 866-867 (C.A. 6). It is also significant that petitioner has made no showing that he was suffering from any medical disability incurred after the time of his basic physical examination which would have authorized his disqualification, even if he had been granted a final physical inspection. Accordingly, no possible prejudice to petitioner has been demonstrated.

2. Petitioner argues that he should have been granted a ministerial classification (IV-D) instead

of conscientious objector status (I-O) (Pet. 10).* As this Court has pointed out, however, the ministerial exemption is a narrow one designed for those who perform leadership functions in their congregation on a regular basis. *Dickinson* v. *United States*, 346 U.S. 389. In accommodating the ministerial exemption to the special circumstances of Jehovah's Witnesses, the Selective Service System has recognized as entitled to such exemptions only those whose functions are comparable to those of pastors in more traditional churches and also those who perform leadership duties that are fairly considered ministerial. As late as June 1967, petitioner was only in "training" to be a qualified teacher in ministerial work (SS File 45). At most, petitioner spent only about 14 hours per week in religious activities. He held a full-time secular job in a defense plant and was motivated to decline civilian work in lieu of induction by a desire to retain this job because of the pay he received. Consequently, he did not make, or apparently intend to make, the ministry his vocation in any category of leadership in his religious sect. Indeed, at the hearing with the State Selective Service representative, petitioner advised

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* It is misleading for petitioner to assert, as he does, that the Selective Service System recognized that he was doing ministerial work or that he had "demonstrated" that being a minister was his vocation (see Pet. 10). All Jehovah's Witnesses who undergo baptism are entitled to call themselves ministers of their sect. Thus, what the representative of the State Director said was that while petitioner was a minister in the eyes of his church, he had not satisfied his local board that he was teaching and preaching the principles of the church as his vocation, the applicable statutory standard (SS File 57).

the representative and the local board that he was neither a full-time nor a pioneer minister of his sect (SS File 56). He was therefore clearly not entitled to a ministerial exemption. *E.g.*, *United States* v. *Sturgis*, 342 F. 2d 328 (C.A. 3), certiorari denied, 382 U.S. 879; *Greer* v. *United States*, 378 F. 2d 931 (C.A. 5); *United States* v. *Jackson*, 408 F. 2d 1000 (C.A. 6), certiorari denied, 396 U.S. 891; *Badger* v. *United States*, 322 F. 2d 902, 907 (C.A. 9), certiorari denied, 376 U.S. 914. See also the government's brief in opposition in *Balderrama* v. *United States*, No. 1679 Misc., this Term, certiorari denied, April 27, 1970.

We note, finally, that since petitioner failed to take an administrative appeal from his June 1967 I-O classification (T. 19-20), he had not exhausted his administrative remedies and therefore is foreclosed from challenging that classification. *Lockhart* v. *United States*, 420 F. 2d 1143, 1146 (C.A. 9); see *McKart* v. *United States*, 395 U.S. 185, 198, n. 16; *United States* v. *Tongue*, 407 F. 2d 774 (C.A. 4), certiorari denied, 395 U.S. 967.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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